Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-344

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UNION PACIFIC RAILROAD CO.,

Petitioner,

vs.

KERMIT KIMBALL SHEEHAN,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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UNION PACIFIC RAILROAD CO.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

Petitioner Union Pacific Railroad Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in favor of the respondent in the above-entitled case on May 31, 1978.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals is unofficially reported at 98 LRRM 2632 and 84 LC 10, 633, and is printed in Appendix A. The opinion of the District Court is reported at 423 F. Supp. 324, unofficially reported at 93 LRRM 2815 and 81 LC 13, 108, and is printed in Appendix B.

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JURISDICTION

The opinion of the Court of Appeals was filed and a judgment in accordance therewith, printed in Appendix C, entered on May 31, 1978. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

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QUESTIONS PRESENTED

1. Must arbitration awards of the National Railroad Adjustment Board contain findings which set forth the Board's reasons for accepting or rejecting each argument raised by a party to the arbitration proceedings?

2. May a court substitute its judgment for the judgment of the National Railroad Adjustment Board simply because the court does not agree with the result reached by the Board?

———o———

STATUTES INVOLVED

This case involves questions as to the proper interpretation and application of provisions of the Railway Labor Act, 45 USC Sec. 151 et seq. (hereinafter referred to as "the Act"). The provisions of the Act pertinent to this case are contained in Section 153, First (i), (m), (o), and (q), which read as follows:

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> (m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.
>
> (o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled

under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

———o———

STATEMENT OF THE CASE

Kermit Sheehan, Respondent here, is a former employee of Petitioner Union Pacific Railroad Co. (hereinafter referred to as "Union Pacific"). Following a hearing held pursuant to the governing collective bargaining agreement between Union Pacific and the Respondent's union, The American Railway Supervisor's Association, Respondent was, on October 17, 1969, discharged by Union Pacific for violation of a work rule. Respondent progressed an intra company appeal of his discharge through his union. Union Pacific's highest officer designated to handle such appeals declined the appeal on February 3, 1970 (App. pp. 10-11, 21-22).

On April 20, 1971, Respondent filed suit against Union Pacific in the District Court of Salt Lake County, Utah. While that suit was pending, this Court decided *Andrews v. Louisville & Nashville Railroad Co.*, 406 U. S. 320 (1972), reversing *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941), in which it was held that a discharged railroad employee's exclusive remedy was an appeal to the National Railroad Adjustment Board (hereinafter referred to as "NRAB" or "the Board"). On the basis of this Court's holding in *Andrews*, Respondent and Union Pacific stipulated for the dismissal of Respondent's state court suit and the court entered an Order dismissing the suit without prejudice to the interests of any party on November 7, 1972 (App. pp. 10-11, 20-21).

On July 25, 1973, Respondent instituted a proceeding before the NRAB by filing a Notice of Intent to File Ex Parte submissions with the NRAB. Thereafter, writ-

ten submissions were tendered by both parties and the Board held two hearings during which the case was argued orally. The second hearing was before a referee and Respondent was allowed to participate by presenting oral argument. On March 5, 1974, the NRAB, by an Order accompanying Fourth Division *Award No. 3045*, denied Respondent's claim. Fourth Division NRAB *Award No. 3045* and accompanying Order are printed in Appendix D. The NRAB's denial of Respondent's claim was based on the fact that Respondent had failed to comply with applicable time limits contained in the governing collective bargaining agreement in bringing his claim before the NRAB. In reading this conclusion the Board rejected the argument of Respondent's attorney that the filing of the action in Utah State Court had the effect of tolling the time limits contained in the collective bargaining agreement (App. pp. 19-23).

On June 20, 1975, Respondent instituted this action in the United States District Court for the District of Utah, Central Division. Jurisdiction in the District Court was based on Title 45, United States Code, Section 153, First (q). In an opinion dated September 7, 1976, the District Court affirmed the Order of the NRAB and granted Union Pacific's Motion to Dismiss, which the Court treated as a Motion for Summary Judgment. The basis for the District Court's action was that Respondent had failed to demonstrate the existence of any grounds for reversal of the NRAB Order under 45 USC, Section 153, First (q) (App. pp. 16-17).

In an opinion dated May 31, 1978, the Court of Appeals for the Tenth Circuit held that in rendering its

award in the instant case the Board denied Respondent due process of law. The Court of Appeals, accordingly, directed that the cause be remanded to the Board for further proceedings.

—o—

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable decisions of this Court and other Courts of Appeals to the effect that awards of the National Railroad Adjustment Board need not set forth the Board's reasons for accepting or rejecting each argument raised by a party to the arbitration proceeding.

Before both the NRAB and the District Court, Respondent argued that the time limitation contained in the collective bargaining agreement governing the time for filing appeals to the NRAB was tolled during the pendency of his action in Utah state court:

> "Plaintiff therefore argues NRAB should have held . . . that the time limitation was tolled during the pendency of the state suit." (App. pp. 13-14).

This argument has been characterized as "equitable tolling".

The Court of Appeals found that the NRAB failed to consider Respondent's equitable tolling argument and concluded that the failure of the Board to consider this argument amounted to a denial of due process. On this basis the Court directed that the cause be remanded to

the Board for further proceedings. Petitioner submits that the Court of Appeals' statement that the NRAB failed to consider the equitable tolling argument is in direct conflict with the record which clearly indicates that the Board did consider the equitable tolling argument and chose to reject it.

At Page 2 of *Award No. 3045* the Board, in pertinent part, stated:

> "Nor do we agree with Mr. Arnold that the time limits did not commence running until the Utah court dismissed claimant's breach of contract suit in November, 1972. Filing of the civil suit did not have the effect of obviating the time limits in the Agreement. When claimant decided to pursue his remedies with this Board he was obligated to do so in the manner prescribed in the applicable Agreement in effect on the property." (App. pp. 21-22).

The foregoing hardly indicates that the Board failed to consider the equitable tolling argument. On the contrary, the Board's language clearly indicates that the Board *did* consider Respondent's equitable tolling argument but concluded that it was without merit. The only thing which the Board failed to do was to set forth its reasons for rejecting the tolling argument.

Since, as pointed out above, the Board clearly considered the tolling argument and rejected it, the Court of Appeals' decision can only stand for the proposition that the Board must set forth its reasons for rejecting the argument. This—setting forth its reasons for rejecting the argument—is the only thing which the Board failed to do in the instant case. Further buttressing the conclusion that the Court of Appeals is demanding that the

Board explain its reasons for rejecting the tolling argument is the language of the Court of Appeals' decision which indicates that the court feels a more stringent review of Board decisions on *"purely legal issues"* is in order:

> "Considering the implications arising from, and the developments since *Andrews v. Louisville & Nashville RR,* 406 U. S. 320, and the elimination of the right to sue on the employment contract in the state courts, it is possible that the extent or scope of judicial review of *purely legal issues* decided by the National Railroad Adjustment Board should be reexamined. The Board members are not chosen for their legal expertise; they are chosen to interpret and apply the collective bargaining agreements." (App. pp. 4-6).

Only if the Board explains its reasoning with respect to *"purely legal issues"* can the courts undertake to more closely examine the validity of the Board's reasoning as the Court of Appeals suggests. Thus, it seems that the reason the Court of Appeals held the Board's action to be invalid was not because the Board failed to consider Respondent's tolling argument—because the Board clearly did consider the argument—but because the Board failed to explain its reasons for rejecting the argument.

Insofar as the Court of Appeals' decision is based on the fact that the Board failed to explain its reasons for concluding that ". . . Filing of the civil suit did not have the effect of obviating the time limits contained in the agreement", the court's opinion is in conflict with previous decisions of this Court as well as with decisions of other courts of appeals. In *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U. S. 593 (1959),

this Court specifically rejected the notion that an arbitrator is obligated to explain the rationale which led to a given conclusion:

> "Arbitrators have no obligation to the court to give their reasons for an award." 363 U. S. 598.

This Court's opinion in *Steelworkers* also rejects the suggestion made by the Court of Appeals in the instant case that courts should undertake a broader review of the Board's findings on "purely legal issues":

> "The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in United Steelworkers of America v. American Manufacturing Co., ante, p. 564, decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

Several Courts of Appeals have also concluded that arbitrators need not set forth their reasons for an award. See *e. g., Thomas v. Illinois Central Railroad Co., et al.*, 521 F. 2d 208, 214 N. 10 (5th Cir. 1975). (It is not necessary for the referee to make specific findings on issues presented to it.); *Rossi v. TWA, Inc.*, 507 F. 2d 404, 405 (9th Cir. 1974). ("We cannot require an arbitration board to spell out for our benefit the logical process by which it makes its decision."); and *Diamond v. Terminal Railway, Alabama State Docks*, 421 F. 2d 228, 233-34 (5th Cir. 1970). (To be enforceable an NRAB decision simply has to have an inferentially rational basis that furthers the aim of the collective bargaining agreement.).

From the foregoing it is apparent that the Court of Appeals would require the Board to set forth its reasons for rejecting Respondent's equitable tolling argument and it is equally apparent that such requirement is in conflict with decisions of this Court as well as with decisions of other Courts of Appeals.

2. The decision below is in conflict with applicable decisions of this Court and decisions of other Courts of Appeals to the effect that a court may not substitute its judgment for the judgment of the National Railroad Adjustment Board simply because the Court does not agree with the result reached by the Board.

As established, supra, the record in the instant case clearly indicates that the Board *did* consider Respondent's equitable tolling argument and chose to reject it. By remanding the case to the NRAB, the Court of Appeals is doing nothing more than attempting to substitute

its judgment—that the equitable tolling argument should apply—for the judgment of the Board. In short, the Court of Appeals did not like the result reached by the Board and "stretched" to find a reason to overturn the award in order to give the Board another opportunity to reach the "correct" result.

The Court of Appeals' discussion of *Barrett v. Manufacturers Railway Company*, 453 F. 2d 1305 (8th Cir. 1972), at pages 6 and 7 of its decision indicates that the court disagrees with the result reached by the Board and feels that the Board should have applied the doctrine of equitable tolling:

> "In Barrett v. Manufacturers Railway Co., 453 F. 2d 1305 (8th Cir.), the plaintiff employee was required under the terms of the collective bargaining agreement to file his appeal with the NRAB six months from the date he received the decision of Railway's vice president. He failed to do so and the Board would not hear the merits of his claim. The Eighth Circuit upheld the NRAB's decision, stating that '. . . the decision of the arbitrators is final and not subject to review on either the merits or procedural issues.' Although the employee in *Barrett* was contesting his discharge, he elected to pursue his remedies before the Board. Therefore, understandably, time limitations under the agreement should be strictly applied. Mr. Sheehan, on the other hand, pursued his remedy in state court which was subsequently extinguished in *Andrews*."

In distinguishing *Barrett* from the case at bar, the court is clearly suggesting that the Board should reach a different result than that reached in *Barrett* and in so doing is obviously attempting to substitute its judgment for the judgment of the Board.

The Eighth Circuit Court of Appeals' decision in *Barrett* is also important to the instant case for another reason. In *Barrett* the Board reached the same result as it did in the instant case (i.e., the "merits" of the claim were not addressed because the claim was not appealed to the Board in a timely fashion) and the Eighth Circuit affirmed the award finding nothing wrong with the result reached by the Board. Thus, the Court of Appeals' decision in the instant case is in direct conflict with the decision of the Eighth Circuit in *Barrett* and should be reviewed for this if for no other reason.

To the extent that the Court of Appeals has substituted its judgment for the judgment of the Board simply because it disagrees with the result reached by the Board, the decision is in direct conflict with the decisions of this court in *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 326 (1972) and *Gunther v. San Diego & A. E. R. Co.*, 382 U. S. 257 (1965). In *Andrews* this Court, in discussing the purposes of the Railway Labor Act, stated, in part, as follows:

> "The term 'exhaustion of administrative remedies' in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U. S. 601 (1959). He is limited to the judicial review of the Board's pro-

ceedings that the Act itself provides. Gunther v. San Diego & A. E. R. Co., 382 U. S. 257 (1965). In such a case the proceedings afforded by 45 U. S. C. § 153 First (i), will be the only remedy available to the aggrieved party."

In *Gunther* this Court emphasized the necessity for treating awards of the NRAB with finality in the following terms:

> "This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. In Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have. In Union Pacific R. Co. v. Price, 360 U. S. 601, the Court discussed the legislative history of the Act at length and pointed out that it 'was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . .' 360 U. S., at 616. Also in Locomotive Engineers v. Louisville & Nashville R. Co., 373 U. S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes.' P. 38."

By substituting its judgment for the judgment of the Board the Court below is also in direct conflict with decisions of other Courts of Appeals. See *e. g. Kotakis v. Elgin, Joliet & Eastern Railway Co.*, 520 F. 2d 570, 576

(7th Cir. 1975); ("The Board was expected to exercise its expertise in matters of railroad labor disputes, and Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board."); *Devita v. Burlington Northern, Inc.*, 494 F. 2d 347, 349 (9th Cir. 1947); ("Here in *Devita's* case, the trial court made a de novo determination of fact. Some God in heaven may know that it was right and the board was wrong. But Congress does not seem to have committed to us the function of reviewing factual determinations on procedural steps, especially where there was some evidence to support the Board's conclusion."); *Barrett v. Manufacturers Railway Company*, 453 F. 2d 1305, 1307 (8th Cir. 1972); ("The decision of the NRAB in the instant case that the dispute was not timely filed before it should not be disturbed by us on the basis of this record. Arbitration is favored by the law and the decision of the arbitrators is final and not subject to review on either the merits or procedural issues."); and *Diamond v. Terminal Railway Alabama State Docks*, 421 F. 2d 228, 234 (5th Cir. 1970); ("The courts, therefore, must be careful not to restrain the Board in a strait jacket of precedent under the guise of determining whether the Board exceeded its jurisdiction in making a particular award. So long as the Board's decision is drawn from the 'essence' of the bargaining contract, we cannot say that once the Board has fashioned a particular remedy for a particular contract violation, any other remedy fashioned in the future is beyond the Board's authority.").

It is apparent that the Court of Appeals is, in the instant case, substituting its judgment with regard to the

validity of the equitable tolling argument for the judgment of the Board. In so doing the Court below is improperly denying finality to *Award No. 3045* and thwarting the purposes of the Railway Labor Act as interpreted by this Court in *Andrews* and *Gunther*. Furthermore, the decision of the Court of Appeals in this regard is in direct conflict with the decisions of several other Courts of Appeals cited, supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

5-31-78 76-2001

UNITED STATES COURT OF APPEALS
For the Tenth Circuit

SLIP OPINION

(Filed May 31, 1978)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-2001

KERMIT KIMBALL SHEEHAN,

Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation, and NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION, an agency of the United States of America,

Appellees.

Appeal from the United States District Court
For the District of Utah
Central Division

(D. C. No. C-75-241)

R. Clark Arnold, Reynolds & Arnold, Salt Lake City, Utah, for Appellant.

Robert N. Weatherbee, Omaha, Nebraska (Steven A. Goodsell, Salt Lake City, Utah, with him on the Brief), for Appellee, Union Pacific Railroad Company.

Ramon M. Child, United States Attorney, and Brent Ward, Assistant United States Attorney, on the Brief for Appellee, National Railroad Adjustment Board, Fourth Division.

Before SETH, Chief Judge, DOYLE and McKAY, Circuit Judges.

PER CURIAM.

The appellant Sheehan, a discharged employee of the Union Pacific Railroad, filed an action in the trial court to set aside or reverse a decision of the National Railroad Adjustment Board which had denied him a hearing on his discharge. The trial court treated defendants' motions as motions for summary judgment and granted them. The court thus did not disturb the Board's decision on the basis that the Board had jurisdiction to enter the order it did.

The facts are set out by the district court in Sheehan v. Union Pacific R. R., 423 F. Supp. 324, and need not be repeated here.

However, two preliminary issues should be considered at the outset. First, plaintiff Sheehan urges that the National Railroad Adjustment Board (NRAB) is a proper party to these proceedings because ". . . it was the Board's action in refusing to adjudicate the issue which effectively bars litigation of his [Sheehan's] claims, . . ." On this contention, we agree with the district court's reasoning that the Board's status as a quasi-judicial body makes it inappropriate as a defendant in this case. *See* System Federation v. Braidwood, 284 F. Supp. 607; Fong v. American Airlines, Inc., 431 F. Supp. 1340, at 1342-43.

Second, plaintiff's cause of action under the Labor Management Relations Act, 29 U. S. C. A. § 185 (1965), was properly dismissed. Employees subject to the Railway Labor Act are specifically excluded from coverage under the Labor Management Relations Act. *See* 29 U. S. C. § 142 (3); 29 U. S. C. § 152 (3) (5); Brotherhood of Locomotive Firemen & Enginemen v. United Transportation Union, 471 F. 2d 8 (6th Cir.), headnote No. 2.

The real issue here is whether the Board's determination that it lacked jurisdiction because of non-compliance with the limitations in the modified collective bargaining agreement deprived Sheehan of his due process rights.

We conclude the Board's failure to address the merits of plaintiff Sheehan's claim denied him due process of law.

Union Pacific maintains that the award of the Board complied with the requirements of the Railway Labor Act and the Board acted within its jurisdiction. The Railroad also urges that the NRAB's determination with regard to the time limitations in the collective bargaining agreement is subject to a narrow standard of judicial review under 45 U. S. C. A. § 153 First (p) and (q), and under Gunther v. San Diego & Arizona Eastern Ry., 382 U. S. 257. The provisions of the Railway Labor Act dealing with the Adjustment Board are "to be considered as compulsory arbitration in this limited field." Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. R., 353 U. S. 30; *see* Gunther v. San Diego & Arizona Eastern Ry., 382 U. S. 257. The Senate report on 1966 amendments to Railway Labor Act stated:

"The National Railroad Adjustment Board was established in 1934 under the Railway Labor Act to provide machinery for resolving so-called minor disputes between individual employees and the carriers. Minor disputes arise out of grievances or *interpretation* or *application* of agreements concerning rates of pay, rules, or working conditions." (Emphasis added.) U. S. Code Cong. & Adm. News.

The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the Adjustment Board. Prompt execution of Board orders is a necessity. The range of judicial review in enforcement cases is among the narrowest known to the law and the findings and order of the Board are conclusive. Denver & R. G. W. R. R. v. Blackett, 538 F. 2d 291 (10th Cir.); Diamond v. Terminal Railway Alabama State Docks, 421 F. 2d 228 (5th Cir.); Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. R., 370 F. 2d 833 (10th Cir.).

We agree generally with the railroad that the reviewable aspects of an award have been traditionally confined to lack of jurisdiction, the Board's acting outside the law, or the presence of fraud or corruption. This scope was fully treated by this court in Denver & R. G. W. R. R. v. Blackett, 538 F. 2d 291 (10th Cir.), which concerned a seniority issue and yardmasters' qualifications under the agreement then in force. No jurisdictional question was there present. Lack of due process must always be recognized as a legitimate ground for objection to a decision of the Railroad Adjustment Board. Kotakis v. Elgin, Joliet & Eastern Ry., 520 F. 2d 570 (7th Cir.); Hall v. Eastern Airlines, Inc., 511 F. 2d 663 (5th Cir.). Considering the implications arising from, and the developments since Andrews v. Louisville & Nashville R. R., 406

U. S. 320, and the elimination of the right to sue on the employment contract in the state courts, it is possible that the extent or scope of judicial review of *purely legal issues* decided by the National Railroad Adjustment Board should be reexamined. The Board members are not chosen for their legal expertise; they are chosen to interpret and apply the collective bargaining agreements. In such *interpretation* and *application* their decisions are reviewable only as to such aspects as relate to lack of jurisdiction, fraud or corruption, acting outside the law, and, of course, lack of due process as above mentioned. The Board's expertise and the legislative intent otherwise dictate that the most narrow scope of review must be applied as to all other matters.

Plaintiff Sheehan had two options at the time of his discharge from Union Pacific. He could have treated his grievance as involving a determination of rights as an employee under the bargaining agreement and asserted his rights to be retained as an employee before the Adjustment Board. Or he could have accepted the action of the carrier as a final discharge, and sued in court for a breach of his contract of employment. Slocum v. Delaware, Lackawanna & Western R. R., 339 U. S. 239; Moore v. Illinois Central R. R., 312 U. S. 630. Mr. Sheehan could only choose one course of action. He opted to treat his discharge as final and sue in the state court for breach of his contract of employment. This was under way at the time of the decision of the Supreme Court in Andrews v. Louisville & Nashville R. R., 406 U. S. 320, which extinguished Sheehan's right to sue in state court. This decision made the Board the only forum in which his rights could be adjudicated, and the parties to the

lawsuit in state court stipulated a dismissal. However, the problem before us arose because under the collective bargaining agreement Sheehan had to file an appeal with the Board before May 1971 to meet the twelve-month time limitation in the agreement. This time had by then long passed. Mr. Sheehan did not submit his notice of intent to file an ex parte submission with the Board until July 25, 1973. The Board's award which dismissed Mr. Sheehan's claim without a hearing on the merits stated:

> ". . . Nor do we agree . . . that the time limits did not commence running until the Utah court dismissed claimant's breach of contract suit in November, 1972. Filing of the civil suit did not have the effect of obviating the time limits in the Agreement."

As the district court noted, a persuasive argument can be made for the tolling of time limits. The court in *Andrews* expressed the view that an agreement under the Railway Labor Act was a federal contract governed and enforceable by federal law in the federal courts. 406 U. S. at 323. The applicability of equitable tolling to the agreement in question is not in doubt. While we do not pass on the merits of the tolling issue, we hold the failure of the Board to consider tolling under these circumstances deprived Sheehan of an opportunity to be heard in violation of his right of due process.

In Barrett v. Manufacturers Railway Co., 453 F. 2d 1305 (8th Cir.), the plaintiff employee was required under the terms of the collective bargaining agreement to file his appeal with the NRAB six months from the date he received the decision of Railway's vice president. He failed to do so and the Board would not hear the merits

of his claim. The Eighth Circuit upheld the NRAB's decision, stating that ". . . the decision of the arbitrators is final and not subject to review on either the merits or procedural issues." Although the employee in *Barrett* was contesting his discharge, he elected to pursue his remedies before the Board. Therefore, understandably, time limitations under the agreement should be strictly applied. Mr. Sheehan, on the other hand, pursued his remedy in state court which was subsequently extinguished in *Andrews*. On returning to the Board, he found there was no forum which would hear his claim. *See* Crusen v. United Air Lines, Inc., 239 F. 2d 863 (10th Cir.), and Hodges v. Atlantic Coast Line R. R., 363 F. 2d 534 (5th Cir.), which also dealt with discharges which were pursued before the NRAB.

Appellant Sheehan asks the court to award attorneys' fees in the event the district court is reversed. However, it is clear that plaintiff's claim was brought under 45 U. S. C. A. § 153 First (q) which does not provide for an award of attorneys' fees. Section 153 First (p) of the Act deals with suits by employees to enforce awards of the Board. The latter section provides for an award of attorneys' fees to the employee in the event he ultimately proves successful in securing enforcement of a Board award. Sheehan, however, is not seeking to have the Board's award enforced but is seeking to have the award overturned. Thus jurisdiction of the court is premised upon section 153 First (q). In Burlington Northern Inc. v. American Railway Supervisors Ass'n, 527 F. 2d 216 (7th Cir.), the Seventh Circuit said:

> ". . . In 1966, Section 3 First (q) was enacted to permit unsuccessful employees and carriers to file

petitions for review of Adjustment Board awards. Unlike Section 3 First (p), Congress did not see fit to provide for the recovery of reasonable attorneys' fees in suits for review under Section 3 First (q)."

We hold an award of attorneys' fees in a case such as this was not intended by Congress.

REVERSED AND REMANDED to the trial court for further remand to the National Railroad Adjustment Board.

A true copy

Teste

Howard K. Phillips
Clerk U. S. Court of
Appeals, Tenth Circuit

By /s/ Stephanie Schetrom, Deputy Clerk

(Seal)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

C 75-241

KERMIT KIMBALL SHEEHAN,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation, and NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION, an agency of the United States of America,

Defendants.

ORDER AFFIRMING THE NRAB AND GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed September 7, 1976)

For the plaintiff: R. Clark Arnold, Esq., 318 Kearns Building, Salt Lake City, Utah 84101.

For defendant Union Pacific Railroad Company: S. M. Matheson, Esq., and Robert N. Weatherbee, Esq., 600 Union Pacific Building, Salt Lake City, Utah 84101.

For defendant National Railroad Adjustment Board: Ramon M. Child, United States Attorney, and Brent Ward, Assistant United States Attorney, 200 U. S. Post Office & Courthouse Building, Salt Lake City, Utah 84101.

Background and Arguments

Both of the defendants in the above-entitled case have filed motions to dismiss and all of the parties have filed extensive materials in support of their respective

positions. Oral arguments were heard on March 29, 1976. On May 14, 1976, the plaintiff filed a motion for summary judgment and a stipulation was filed by counsel stating that the court could rule on the summary judgment motion without further briefing or argument. The court has examined the filed materials, including the record of the proceedings before the National Railroad Adjustment Board [NRAB], and is prepared to rule on the motions.

The plaintiff in this case was an employee of the defendant Union Pacific Railroad [Union Pacific]. On October 8, 1969, the plaintiff was charged with violating one of Union Pacific's work rules and a hearing was held on October 10, pursuant to rule 23 of the collective bargaining agreement between the railroad and the plaintiff's union. After the hearing, the plaintiff was dismissed from his employment. The plaintiff unsuccessfully appealed the dismissal within the company and then filed a claim in state district court alleging wrongful discharge and denial of a fair hearing. While that claim was pending, the Supreme Court decided *Andrews v. Louisville & Nashville Railroad Co.*, 406 U. S. 320 (1972), reversing *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630 (1941), in which it was held that a discharged railroad employee's exclusive remedy was an appeal to the NRAB. The parties to the state court proceeding entered into a stipulation and the case was dismissed without prejudice to the interests of any party. The plaintiff then filed an appeal with the Board which was subsequently dismissed on the technical ground that the plaintiff had not filed his appeal within time limits prescribed by the collective bargaining agreement. Following that denial, the plaintiff filed a complaint with this court praying for

an order directing the Board to hear the merits of his case or, in the alternative, for a money judgment and reinstatement against Union Pacific.

Union Pacific maintains that the complaint does not allege facts which invoke the court's jurisdiction to review the Board's decision under the Railway Labor Act because the plaintiff has not alleged that the Board failed to comply with the requirements of the Act, acted outside its jurisdiction, or that the order was affected by fraud or corruption of any Board member. 45 U. S. C. A. § 153 First (q) (1972). The railroad maintains that the plaintiff's claim is a "minor" grievance and that the NRAB determination under compulsory arbitration is intended to be final. Union Pacific also argues that the court must affirm the Board's ruling because it is not wholly baseless or completely without reason. Union Pacific maintains that the plaintiff's contentions relating to denial of a proper hearing are without legal support. Union Pacific also contends that the Labor Management Relations Act does not grant this court jurisdiction over the plaintiff's second cause of action (against Union Pacific for breach of the employment agreement) and that an appeal to the Board is the plaintiff's exclusive remedy. *See* 29 U. S. C. A. § 152 (2) and (3) (1973), *as amended* to 1976.

The NRAB maintains that its status as a quasi-judicial body makes it inappropriate as a defendant in this case. The Board admits that its orders may be subject to judicial review but maintains that filing a case against the Board in federal court is not an appropriate means of obtaining that review. *System Federation No. 30 v.*

Braidwood, 284 F. Supp. 607, 610-11 (N. D. Ill. 1968). The court agrees with the Board's contention that only the disputing parties, Sheehan and Union Pacific, are proper parties in this case.

The plaintiff maintains that his claim was properly and timely filed with the NRAB pursuant to the Railway Labor Act and the rules and procedures promulgated by the Board. The plaintiff's appeal was dismissed by the Board because it had not been filed within the time allowed by the collective bargaining agreement. The plaintiff points out that the period of limitations provision was added to the collective bargaining agreement after his discharge and after the final action by Union Pacific on the plaintiff's internal appeal. Mr. Sheehan also argues that the time requirements were tolled during the pendency of the plaintiff's state court case and that the NRAB should be required to hear and decide his claim on the merits.

The plaintiff does not have a cause of action in his second count under the Labor Management Relations Act, 29 U. S. C. A. § 185 (1965). This case must be treated simply as an appeal from a federal administrative determination. The only real issue relates to the propriety of the NRAB determination that the Board lacked jurisdiction because of a violation of the time limitations in the modified collective bargaining agreement. Judicial review of that decision may be had only within the limits of 45 U. S. C. A. § 153 First (q) (1972).

Analysis

The plaintiff has persuasively argued for tolling the time limits. The policy expressed by the Court of Appeals of the Tenth Circuit supports this view. *Dartt v. Shell Oil Co.*, No. 75-1277 (10th Cir. Filed July 22, 1976). Further,

> Statutes of limitation . . . are designed to promote justice by preventing surprises through the survival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of state claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342, 348-49 (1944). The policy of protecting defendants is, however, "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central Railroad Co.*, 380 U. S. 424, 428 (1965).

Mr. Sheehan argues persuasively that he diligently and in a timely manner pursued one of the two avenues open to him following his discharge and that it is not in the interests of justice to deny the plaintiff relief simply because he elected to pursue his state court remedies rather than to file an appeal to the NRAB when both alternatives were open to him. Union Pacific was on notice that the plaintiff intended to seek relief and was actually pursuing his remedies. The purposes of the time limitation were fulfilled. The plaintiff did not sleep on his rights and Union Pacific does not appear to have been injured by the delay. As in *Order of Railroad Telegraphers v. Railway Express Agency, supra*, the long delay was "caused by the exigencies of the contest, not by

the neglect to proceed." 321 U. S. at 349. Plaintiff therefore argues NRAB should have held, as the Supreme Court did in *Burnett v. New York Central Railroad Co., supra*, that the time limitation was tolled during the pendency of the state suit. This position of the plaintiff has one severe limitation in itself. The ability of this court to review the Board's order has been severely restricted by Congress:

> On [judicial] review the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U. S. C. A. § 153 First (q) (1972). The purpose of the Railway Labor Act is to secure the prompt, orderly and final settlement of minor disputes between employees and the carrier. *See, e. g., Union Pacific Railroad Co. v. Price*, 360 U. S. 601, 613-16 (1959); *Atlantic Coast Line Railroad Co. v. Pope*, 119 F. 2d 39, 41 (4th Cir. 1941); *Crusen v. United Air Lines*, 141 F. Supp. 347, 355 (D. Colo. 1956), *aff'd*, 239 F. 2d 863 (10th Cir. 1956). The above provision, added in 1966, helps to meet that goal by severely restricting the scope of judicial administrative review, thereby increasing the finality of the Board's order. It is subject to the weighty criticisms raised against the scope of it by Justice Douglas in his dissent in the *Andrews* case.

Courts have recognized that their right to review orders of the NRAB is very, very limited, even when the

review involves a procedural issue relating to the timeliness of an appeal to the NRAB and the court is convinced that the Board was incorrect. *Devita v. Burlington Northern, Inc.*, 494 F. 2d 347 (9th Cir. 1974), *cert. denied*, 419 U. S. 869 (1974). To prevail on review, the plaintiff employee usually must show the existence of one of the three statutory grounds for reversal. *E. g., Johnson v. Interstate Railroad*, 345 F. Supp. 1082, 1085 (W. D. Va. 1972); *McDonald v. Penn Central Transportation Co.*, 337 F. Supp. 803, 805-06 (D. Mass. 1972); *Barrett v. Manufacturers Railway Co.*, 326 F. Supp. 639, 643-45 (E. D. Mo. 1971), *aff'd*, 453 F. 2d 1305 (8th Cir. 1972). The plaintiff has failed to meet that burden.

A collective bargaining agreement can impose a time limitation on the institution of an appeal to the NRAB by a railroad employee. *Atlantic Coast Line Railroad Co. v. Pope, supra*, 119 F. 2d at 43-44; *Crusen v. United Air Lines, supra*, 141 F. Supp. at 349. It is equally clear that the NRAB, not the court, has been given the primary jurisdiction to interpret the collective bargaining agreement. *E. g., Kotakis v. Elgin, Joliet & Eastern Railway Co.*, 520 F. 2d 570 (7th Cir. 1975), *cert. denied*, — U. S. — (1976).

As a general guideline in judicial review of administrative action, the court should give deference to the agency's application of legal concepts. The court can, however, in an appropriate case, substitute its judgment concerning the underlying question of law. *E. g., Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785 (2d Cir. 1946, *aff'd*, 328 U. S. 275 [1946]). Unlike the NRAB time limitation cases previously cited by the court,

the parties in this case are in basic agreement concerning the facts. As such, the dispute appears to be purely a question of law concerning whether the state court proceeding could toll the time period under the facts of this case. A careful analysis of 45 U. S. C. A. § 153 First (q) (1972) indicates that the general rule does not apply in appeals from NRAB orders. The statute states that "the *findings* and *order* of the division" may be set aside only if one of the three statutory bases for reversal is found to exist (emphasis added). It appears that the statute is designed to cover not only findings of fact but also the complete order, including legal conclusions. As such, this court is precluded from applying its interpretation of the proper legal standard rather than that of the NRAB.

> Several courts have intimated or directly held that:
>
> [T]he Board's order can be reversed by the courts if it is found to be "actually and indisputedly without foundation in reason or fact" [citations omitted] or "wholly baseless and without reason" [citations omitted]. If a Board decision can be so characterized, it is viewed as outside the "matters within the scope of the division's jurisdiction" under 45 U. S. C. § 153 First (q).

Kotakis v. Elgin Joliet & Eastern Railway Co., supra, 520 F. 2d at 574-75; *see Gunther v. San Diego & Arizona Eastern Railway Co.,* 382 U. S. 257, 261 (1965); *Laday v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 422 F. 2d 1168, 1171 (7th Cir. 1970); *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.,* 415 F. 2d 403, 414 (5th Cir. 1969), *cert. denied,* 396 U. S. 1008 (1970). In applying the above standard to this

case, it cannot be said that the NRAB's determination was without foundation in reason or fact and therefore beyond the Board's jurisdiction.

The plaintiff has failed to demonstrate the existence of any of the grounds for reversal under 45 U. S. C. A. § 153 First (q) (1972) and the court has been unable to find any legal principle under which it can grant the plaintiff relief without violating the provisions of the Railway Labor Act. Consequently,

IT IS HEREBY ORDERED that the order entered by the NRAB is affirmed and the defendants' motions to dismiss, treated as motions for summary judgment, are granted.

DATED this 7th day of September, 1976.

/s/ Aldon J. Anderson
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM—May 31, 1978

Before Honorable Oliver Seth, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges

KERMIT KIMBALL SHEEHAN,

Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation, and NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION, an agency of the United States of America,

Defendants-Appellees.

JUDGMENT

No. 76-2001

(D. C. No. C-75-241)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Utah with instructions that it be promptly remanded to the National Railroad Adjustment Board for farther proceedings in accord with the opinion of this Court.

/s/ Howard K. Phillips, Clerk

A true copy
Teste

SEAL By Stephanie Schetrom, Deputy Clerk.

APPENDIX D

Form 2(a) NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION

ORDER

To accompany (Award Number 3045
(Docket Number 3028

Mr. R. Clark Arnold

Attorney at Law
Suite 318, Kearns Building
136 South Main
Salt Lake City, Utah 84101

The Division, after consideration of the Docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is denied as set forth in the award, a copy of which is attached and made a part of this Order.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By /s/ Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 5th Day of March, 1974.

Copy to: Mr. G. L. Farr, Vice President, Labor Relations
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68102

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD, FOURTH DIVISION

Award No. 3045
Docket No. 3028

Referee Robert M. O'Brien

Parties to Dispute:

Kermit Kimble Sheehan

Union Pacific Railroad Company

Statement of Claim:

Claim and request of Kermit Kimble Sheehan that:

Kermit Kimble Sheehan claims that he is entitled reinstatement with back pay from October 17, 1969, by reason of his wrongful discharge from employment with the Union Pacific Railroad Company and his denial of a fair hearing as required by Rule 23 of the Labor Management Agreement between the American Railway Supervisor's Association, Inc., and the Union Pacific Railroad Company.

Opinion of Board:

On October 6, 1969 an article appeared in the Desert News, a newspaper of general circulation in the Salt Lake City area, indicating that Utah State Liquor officers had filed charges of illegal sale of alcohol against claimant. Carrier was not mentioned in the article nor was claimant identified as an employee of Carrier. Following a hearing held October 10, 1969, claimant was discharged effective October 17, 1969 for violation of Rule 700 in that Carrier had been subjected to criticism and embarrassment due to the above newspaper article. Claimant now seeks reinstatement with back pay due to his alleged wrongful discharge.

The claim had been appealed on the property and, also, suit was filed by claimant in the Utah courts on a breach of contract theory. That suit was dismissed on November 7, 1972 the Court concluding that appeal to the National Railroad Adjustment Board was mandatory in grievances of this nature.

Carrier argues that the claim is barred by the applicable time limits since it was not timely filed with this Board. We agree with Carrier in this regard. Under date of April 21, 1970 an agreement was entered into between Carrier and the American Railway Supervisors' Association, the duly authorized bargaining agent for foremen in Carrier's Mechanical Department. That Agreement provided the machinery for handling all claims and grievances arising on or after May 1, 1970 as well as all pending claims, and provided, in pertinent part,:

> "... in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment ... before the claim or grievance is barred."

It is our opinion that the time limits contained in the above Agreement are clearly applicable to the claim at hand. Mr. Acord, Carrier's highest designated officer, had declined the claim on February 3, 1970, which was prior to the effective date of this rule, May 1, 1970. Consequently, it was incumbent upon claimant to file his claim within 12 months of the effective date of the rule, or by May 1, 1971. However, Mr. Arnold, claimant's attorney, did not submit his notice of intent to file an ex

parte submission with this Board until July 25, 1973, well after the 12 month time limit.

Mr. Arnold, claimant's attorney, has argued the Agreement that was in effect at the time of discharge is applicable to this claim, and since that Agreement contains no time limits on the filing of claims with this Board, the claim is not barred. We disagree, however. The April 21, 1970 Agreement explicitly applies to claims filed prior to the effective date of this rule on which Carrier's highest designated officer has previously ruled. All the conditions of that Agreement have been met in the claim before us and we cannot disregard the clear provisions thereof. Nor do we agree with Mr. Arnold that the time limits did not commence running until the Utah court dismissed claimant's breach of contract suit in November, 1972. Filing of the civil suit did not have the effect of obviating the time limits in the Agreement. When claimant decided to pursue his remedies with this Board he was obligated to do so in the manner prescribed in the applicable Agreement in effect on the property. Since he failed to comply with the time limits of the Agreement, we have no standing to decide the merits of the claim and we are constrained to dismiss the claim for non compliance with the applicable time limits.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934:

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of the Fourth Division

ATTEST: Executive Secretary
National Railroad Adjustment Board

By: /s/ Nancy J. Dever
Assistant Executive Secretary

Dated at Chicago, Illinois, this 5th Day of March, 1974.